

IS THE *MIRANDA* CASELAW REALLY INCONSISTENT? A PROPOSED FIFTH AMENDMENT SYNTHESIS

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In *Miranda v. Arizona*¹ the Supreme Court held that custodial interrogation amounts to unconstitutional compulsion to be a witness against oneself, unless the interrogation is preceded by the famous warnings or "equally effective" measures to reduce the pressure to confess. Two years later, in a season of rising crime rates, riots, and assassinations, Congress responded by adopting Title II of the Omnibus Crime Control and Safe Streets Act.² Title II provides that confessions will be admissible in federal courts so long as they were voluntarily made. In other words, Congress mandated a return to the pre-*Miranda* voluntariness standard based on due process, rather than the self-incrimination clause of the Fifth Amendment.

Because Congress declined to require any alternative procedures to reduce the compulsion attending custodial questioning, Title II purports to repudiate, rather than to implement, *Miranda*. If *Miranda* is good law, the statute is unconstitutional, as was long supposed by the Department of Justice, which refused to invoke the statute in federal cases. In the years since *Miranda*, however, majority opinions of the Supreme Court have characterized the *Miranda* rules as "not themselves rights protected by the Constitution" but as "measures to insure that the right against compulsory self-incrimination was protected,"³ a "prophylactic rule."⁴

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1. 384 U.S. 436 (1966).

2. Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501. In this article the statute will be referred to interchangeably as "Title II" and as "§ 3501."

3. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

4. *New York v. Quarles*, 467 U.S. 649, 657 (1984).

The Fourth Circuit's recent decision in *United States v. Dickerson*⁵ relied on the Court's characterization of *Miranda* as merely prophylactic to sustain the constitutionality of Title II and admit a confession made by a suspect who was not warned of his. As the Justice Department pointed out in a brief supporting the defendant's petition for certiorari,⁶ however, the Court's characterization of *Miranda* as prophylactic collides with an extensive line of cases reversing state conviction because of *Miranda* violations.⁷ If *Miranda*'s safeguards are not "themselves required by the Constitution," the Court has no authority to reverse state convictions on *Miranda* grounds. Yet the modern Court has gone so far as to hold not only that it can reverse state convictions, but also that *Miranda* claims are cognizable in federal district court on habeas petitions filed by state prisoners.⁸

The prevailing academic view, one that spans the ideological spectrum, is that the "prophylactic rules" cases are flatly inconsistent with the cases reversing state decisions.⁹ The commentators do not agree on how to resolve the tension between

5. 166 F.3d 667 (4th Cir. 1999), cert. granted, 120 S. Ct. 578 (Dec. 6, 1999).

6. *United States v. Dickerson*, No. 99-5525, Brief for the United States in Support of the Petition for Certiorari (November 1999).

7. See, e.g., *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Edwards v. Arizona*, 451 U.S. 477 (1981).

8. *Withrow v. Williams*, 507 U.S. 680 (1993).

9. See, e.g., Joseph D. Grano, *Confessions, Truth, and the Law* 218 (U. of Michigan Press, 1993) ("The current situation is doctrinally unstable, with two lines of irreconcilable cases coexisting to give the Court a choice between allowing or disallowing the police to have the necessary tools for effective interrogation."); Martin R. Gardner, *Section 1983 Actions Under Miranda: A Critical View of the Right to Avoid Interrogation*, 30 Am. Crim. L. Rev. 1277, 1291 (1993) ("*Harris, Tucker, and Quarles* have been roundly criticized as inconsistent with essential aspects of *Miranda*.") (footnote omitted); Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 Ohio St. L.J. 733, 740 (1987) ("Decisions such as *Tucker, Quarles, and Elstad* cut the doctrinal heart out of *Miranda*."); Yale Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court*, in *The Burger Years: Rights and Wrongs in the Supreme Court 1969-1986*, at 143, 155 (Herman Schwartz, ed., Viking, 1987) (Earl Warren, author of *Miranda*, would be "taken aback" by the prophylactic rules approach); Leslie A. Lunney, *The Erosion of Miranda: Stare Decisis Consequences*, 48 Cath. U. L. Rev. 727 (1999) (arguing generally that the *Miranda* caselaw is inconsistent and that the justices have been disingenuous in developing it); Irene Merker Rosenberg and Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self Incrimination*, 63 N.Y.U. L. Rev. 955, 957 n.4 (1988) ("By denying the constitutional origins of the *Miranda* warnings and effectively illegitimizing them, the Court has provided a theoretical underpinning for *Miranda*'s ultimate demise."); Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 123 ("*Tucker* seems certainly to have laid the groundwork to overrule *Miranda*.") (footnote omitted). When the Rosenbergs cite Stone and Grano for the proposition that *Tucker* and like cases are inconsistent with *Miranda*, see Rosenberg and Rosenberg, 63 N.Y.U. L. Rev. at 956 n.4, there can be no doubt that thoughtful commentators across a wide spectrum of ideological persuasions suspect the Court of inconsistency.

the state *Miranda* cases and the prophylactic-rules cases. Proponents of suspects' rights urge an equation of *Miranda* violations with pristine compulsion of testimony under a subpoena and an immunity order.¹⁰ Critics of *Miranda* suggest overruling that landmark decision for want of any legitimate constitutional basis.¹¹ The only unanimous point is that the Supreme Court is in an embarrassing position.

This essay challenges that conventional wisdom about the *Miranda* caselaw. At the level of dicta or rationale, there is indeed an embarrassing inconsistency between those opinions characterizing *Miranda* as merely prophylactic and those decisions reversing convictions coming out of state courts. The former dicta cannot be squared with the latter holdings. But American lawyers learn in the first year of law school that holdings count for more than language in the opinions. Dicta matter, especially from a Court whose every pronouncement is scanned with care. But holdings matter still more.

At the level of holdings, decisions taking a narrow view of what constitutes custody or interrogation, or a broad view of what constitutes a valid waiver of *Miranda* rights, do not impugn *Miranda*'s constitutional grounding. Admitting evidence because the police complied with *Miranda* cannot tell us that *Miranda* is not constitutional.¹² All that can be drawn from such holdings is that the Court's careful scrutiny of state police practices in some of these cases implicitly affirms *Miranda*'s constitutional stature.

Only when the Court has found that the *Miranda* rules were violated by the police, but that the evidence so obtained should nonetheless have been admitted, do the holdings of the cases potentially impugn *Miranda*'s constitutional basis. A careful look at *Miranda*'s progeny reveals that in only five cases has the Court held a statement tainted by a *Miranda* violation never-

10. See, e.g., Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109, 177-78 (1998).

11. See, e.g., Grano, *Confessions, Truth, and the Law* at 199-222 (cited in note 9).

12. For example, in *Davis v. United States*, 512 U.S. 452, 457 (1994), the Court's opinion described the *Miranda* right to counsel as constitutionally recommended rather than required. The *Davis* holding that invocation must be unequivocal, however, is simply an interpretation of *Miranda*, not a decision admitting evidence obtained in violation of the *Miranda* safeguards. Similarly, in *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987), the Court characterized *Edwards* and *Miranda* as "prophylactic," but the *Barrett* holding that the suspect's refusal to make a written statement did not taint his oral admissions is, like the holding in *Davis*, an interpretation of, rather than a departure from, *Miranda*.

theless admissible in evidence. The five cases, in chronological order, are:

(1) *Harris v. New York*,¹³ holding that a statement obtained from an unwarned suspect may be used to impeach his testimony at trial;

(2) *Michigan v. Tucker*,¹⁴ holding that the constitution does not require suppressing the testimony of a third-party witness whose identity came to the attention of the police as a result of questioning a suspect who had invoked the right to counsel in response to the *Miranda* warning;

(3) *Oregon v. Hass*,¹⁵ holding that the *Harris* impeachment exception applies to post-invocation statements as well as to unwarned statements;

(4) *New York v. Quarles*,¹⁶ holding that questioning without warnings, in an emergency situation, falls within a public safety exception to *Miranda*;

(5) *Oregon v. Elstad*,¹⁷ holding that an otherwise valid waiver of *Miranda* rights is not necessarily tainted by a previous admission made in response to custodial interrogation without the required warnings.

My thesis is that these results can, in the main, be squared with *Miranda*. Consistency might require overruling *Hass*, but reasonable lawyers might disagree about even that much. The conventional wisdom is quite correct in describing the legal theory of *Tucker*, *Elstad* and *Quarles* as inconsistent with the legal theory of *Miranda*. But it is by no means impossible to construct legal theories, not articulated by the majority opinions, that can preserve almost all of the holdings in the *Miranda* caselaw.

In this essay I adopt the perspective of the law of evidence. Privileges, whether based on constitutional, statutory, or common-law authority, require procedural rules to regulate the assertion and waiver of the privilege. They require further rules to define remedies for unauthorized disclosure. This essay argues that the *Miranda* case law is either congruent with prevailing Fifth Amendment privilege jurisprudence or departs from the general jurisprudence in justifiable ways.

13. 401 U.S. 222 (1971).

14. 417 U.S. 433 (1974).

15. 420 U.S. 714 (1975).

16. 467 U.S. 649 (1984).

17. 470 U.S. 298 (1985).

This does not excuse the Court's opinions, which announce incompatible theories about the application of the privilege in the context of police interrogations. Nonetheless there is nothing bizarre about opinions going further than the result in the case at hand. It often falls to the lawyers in subsequent cases to try and develop a hitherto-unstated rationale or theory that can justify as much of the existing corpus of precedent as possible. This essay undertakes that familiar lawyerly project.

The analysis proceeds in three stages. First, I characterize *Miranda* itself simply as a special rule governing the waiver of the Fifth Amendment privilege in the uniquely coercive environment of custodial interrogation. Second, I explain how each of the five supposedly inconsistent precedents, *Hass* excepted, can be squared with the special waiver rule established by *Miranda*. Third, I note how a reconciliation of the *Miranda* precedents might bear on the *Dickerson* litigation. I would be the first to admit that reconsidering *Miranda* in light of a serious alternative, such as in-court questioning, might be *desirable*. But there is no *necessity*, rooted in either legal legitimacy or the need for a coherent body of law, to reconsider *Miranda* at this time.

I. CHARACTERIZING *MIRANDA*

The *Miranda* warning is known to every television viewer in the country, and the Warren Court's turn to bright-line rules, founded on the Fifth Amendment rather than the Sixth, has been well chronicled by other scholars. As a result there is no need for an extended discussion of *Miranda* itself. What requires some discussion, and what has received inadequate recognition by scholars and judges, is the way in which *Miranda* departs from the general law governing the Fifth Amendment privilege against self-incrimination. Viewed from the perspective of privilege law at large, *Miranda* is nothing more nor less than a special waiver rule applicable in the unique context of custodial interrogation.

Historically and throughout the Supreme Court's self-incrimination jurisprudence, the privilege could (and still can) be claimed during any proceeding. It can be claimed before a grand jury,¹⁸ before a legislative committee,¹⁹ and before an administra-

18. See, e.g., *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

19. See, e.g., *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990).

tive agency.²⁰ In each of these contexts, the traditional waiver rule is *use it or lose it*. The individual must assert the privilege; answering questions, even when the failure to answer is subject to the contempt sanction, waives the privilege absent an express invocation.²¹

A citizen protected by the privilege *always had* the right to refuse to answer questions put by the police. With the peculiar exception of the required records cases,²² a citizen is never under an affirmative legal duty to come forward and confess the commission of a completed crime to the authorities. In other words, the privilege against compelled self-incrimination secures the "right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."²³ The Court's cases permit drawing rational inferences from refusals to speak,²⁴ but they forbid state-imposed penalties for exercising the right to remain silent.²⁵

The *Miranda* opinion took great pains to characterize police interrogation as a uniquely coercive setting.²⁶ To this day, that characterization rings true. The suspect is not free to leave; he may be in handcuffs, but in any event he will be in the physical control of armed police. If he attempts to leave, he will be

20. See, e.g., *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447 (1894).

21. See *United States v. Mandujano*, 425 U.S. 564, 574-75 (1976) (plurality opinion); *United States v. Monia*, 317 U.S. 424, 427 (1943); *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 113 (1927); John W. Strong, *McCormick on Evidence* § 130 (West, 5th ed. 1999).

22. See, e.g., *Shapiro v. United States*, 335 U.S. 1 (1948). For modern limitations on the required-records doctrine, see *Grosso v. United States*, 390 U.S. 62, 67-68 (1968).

23. *United States v. Balsys*, 524 U.S. 666, 681 (1998) (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)) (omission in original).

24. Compare *Mitchell v. United States*, 119 S. Ct. 1307 (1999) (Fifth Amendment prohibits sentencing court from drawing adverse inference from silence), *Carter v. Kentucky*, 450 U.S. 288 (1981) (judge is required to instruct jury not to draw adverse inference from silence if defense requests such an instruction); and *Griffin v. California*, 380 U.S. 609 (1965) (Fifth Amendment prohibits judicial or prosecutorial comment on defendant's refusal to testify at trial), with *Lachance v. Erickson*, 522 U.S. 262 (1998) (administrative agency may draw adverse inference from silence); *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (prison authorities may draw adverse inference from silence in disciplinary proceedings); and *Fletcher v. Weir*, 455 U.S. 603 (1982) (state is permitted to impeach defendant's testimony with prearrest silence). *Doyle v. Ohio*, 426 U.S. 610 (1976), forbidding impeachment of the criminal defendant's trial testimony by cross-examination about the refusal to make a statement after police deliver *Miranda* warnings, rests on the unfairness of luring the suspect into incriminating silence.

25. See *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (disqualification from public contracts); *Uniformed Sanitation Men Assn. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968) (denial of public employment); *Garrity v. New Jersey*, 385 U.S. 493 (1967) (denial of public employment).

26. See *Miranda v. Arizona*, 384 U.S. 436, 457-61 (1966).

clubbed or shot. The familiar methods of police interrogation rely on psychological pressure, deception, and manipulation. They would not be permitted on the cross-examination of any witness in any judicial proceeding. They would void any contract on the ground of duress and any will on the ground of undue influence.

Miranda's critics deny that every admission by a suspect in custody is compelled. Fifth Amendment law generally, however, defines compulsion according to general categories rather than on a case-by-case, totality-of-the-circumstances approach. For example, when a grand jury witness negotiates an immunity agreement through counsel, the immunized testimony may very well include some statements that the witness would have been willing to make even without immunity. Yet there is no statement-by-statement inquiry as to which statements were caused by the threat of contempt. Comment on the defendant's failure to testify is deemed compulsion,²⁷ without any case-specific inquiry into whether the particular defendant has any reason other than guilt for standing silent (such as a prior conviction that would be admitted to impeach).

Miranda deemed custodial interrogation, absent the warnings or similar measures, to constitute compulsion, just as traditional Fifth Amendment law deems questioning under an immunity order compulsion. The judgment struck by *Miranda* is entirely consistent with general Fifth Amendment jurisprudence. If, as the Court has held, the denial of public contracts,²⁸ or comment on the failure to testify,²⁹ without more, constitutes compulsion, custodial interrogation, without more, surely constitutes compulsion as well. Nonetheless, a witness subject to compulsion may, in appropriate circumstances, waive the right to remain silent.

Before a legislative committee or a grand jury, the suspect who speaks first and invokes the privilege later may not suppress his incriminatory admissions.³⁰ His choice to speak was sufficiently unpressured to be characterized, by itself, as a waiver of the right to remain silent. By contrast, the suspect in custody is under a different and more intense kind of pressure to speak

27. *Griffin v. California*, 380 U.S. 609 (1965).

28. See *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

29. *Griffin*, 380 U.S. at 614.

30. Indeed, under *Rogers v. United States*, 340 U.S. 367 (1951), the witness must not only refuse to answer but must contemporaneously cite the privilege as the reason for standing mute.

rather than stand silent. He is given the *Miranda* warning to place him in a position to claim the privilege that is roughly equivalent to the position of the witness before the grand jury. What divides *Miranda*'s critics and defenders is whether a special rule for waiving the right to remain silent is constitutionally required during custodial interrogation, not whether individuals in custody have a constitutional right to remain silent.³¹

This is not a question to which we will find a specific answer in the intentions of the framers, for the modern police force did not exist until the middle portion of the nineteenth century. Police interrogation as we know it had not supplanted judicial examination of the accused until even later. The assumption that the framers intended the traditional waiver rule to apply in an untraditional context can be neither proved nor disproved.

As a matter of first impression, the justification for a proactive rather than reactive waiver rule for police interrogation makes perfect sense. The idea behind *Miranda* is that the warning and the offer of counsel more or less equalize the pressure of police interrogation and the pressure of interrogation before the grand jury under formal process. It follows that once the warning has been given, the traditional waiver rule is reinstated. Under *Davis v. United States*,³² the suspect must clearly and unequivocally invoke his Fifth Amendment rights, just as he must do before the grand jury.

Why does the suspect hailed before the grand jury not enjoy the benefit of target warnings similar to the *Miranda* warnings? Chief Justice Burger's opinion in *United States v. Mandujano* reasoned that police interrogation, although not compelled by formal process, is as a practical matter more coercive than formal questioning before the grand jury.³³ The grand jury witness has the opportunity to prepare for questioning and to consult re-

31. Professor Grano denies that suspects have a "positive right of silence" but admits "a right of silence that exists only in the weak or indirect sense that the person cannot be required or compelled to answer questions." Grano, *Confessions, Truth, and the Law* at 44 (cited in note 9) (footnote omitted). *Miranda* holds that absent the warning (or something like it) a suspect who is questioned in custody is indeed "required or compelled to answer the questions." See *Miranda*, 384 U.S. at 469 (the warning "at the time of interrogation is essential to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.")

32. 512 U.S. 452 (1994).

33. See *United States v. Mandujano*, 425 U.S. 564, 579 (1976) ("[T]he compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.") (quoting *Miranda*, 384 U.S. at 461) (brackets original in *Mandujano*).

tained counsel prior to questioning, and has little to fear from brutality or browbeating with a court reporter and twenty three honest citizens observing the proceedings.

This characterization should help to dispel the idea that *Miranda* was *ultra vires* at the time of decision. The Fifth Amendment's text says nothing about waiver. The traditional waiver rule is implied by history, but only within the compass of familiar forms of questioning. If a suspect on the rack answered questions without asserting his privilege, the government would not be heard to argue that the privilege must be claimed and that answering the questions waives the privilege. Police interrogation is not, except in rare cases of abuse, torture. But it is different enough from traditional questioning under oath to allow the Court to fashion a different waiver rule to deal with a unique procedural setting.

Dickerson and prevailing opinion agree that post-*Miranda* cases have repudiated *Miranda*'s basis in the Fifth Amendment. I believe that, while there is plenty of *language* in subsequent opinions that casts doubt on *Miranda*'s constitutional status, the *holdings* of the cases can be squared with the characterization of *Miranda* as a special waiver rule that counts as constitutional law because the privilege at stake is a constitutional right. This accommodation does not require any bizarre theorizing. None of the cases to be reconciled will be recharacterized as limited to its facts on an arcane retroactivity theory. Neither the Third Amendment nor the Privileges and Immunities Clause will be called upon for any critical doctrinal work. The analysis, ironically, is entirely conventional in method yet substantially novel in content.

II. EXPLAINING THE CASES THAT ADMIT EVIDENCE TAINTED BY *MIRANDA* VIOLATIONS

A. *HARRIS V. NEW YORK*

Viven Harris was charged with selling heroin to a New Rochelle police officer on two occasions, once on January 4 and once on January 7, 1966.³⁴ On January 7, he was arrested and in-

34. The discussion of the facts is based on the Supreme Court's opinion in *Harris v. New York*, 401 U.S. 222 (1971). In at least one respect the Court's opinion is clearly wrong. In *Harris*, the Court says that Harris "makes no claim that the statements made to the police were coerced or involuntary." If Harris claimed that his statements were coerced as well as compelled, the case would have had to be remanded for a determina-

terrogated, without being first apprized of any right to consult with appointed counsel. From the police standpoint, there was no reason for such a warning, because *Miranda* had not yet been decided. In response to police questions, Harris said he had purchased heroin from a third party at the officer's direction and with money supplied by the officer.

At trial, the government did not offer the statement into evidence, so no hearing was held on its admissibility. Instead, the officer testified that Harris had sold him heroin on January 4 and 6. The petitioner took the stand and testified that he had sold nothing to the officer on the fourth, and only baking powder on the sixth. On cross-examination, the prosecutor, over defense objections, read the transcript of what Harris had said during the police questioning, and asked Harris if he remembered making the statements.

The Supreme Court framed the issue as whether the Constitution permitted impeachment with statements obtained in violation of *Miranda*. The *Miranda* opinion had spoken to this issue and indicated that statements obtained without the required warning and waiver could not be used for impeachment.³⁵ Moreover, unlike evidence obtained in violation of the Fourth Amendment, the Fifth Amendment condemns compelled self-incriminating testimony only when it might be used at a later trial of the witness. Thus the use in evidence seems to constitute a second violation of the Fifth Amendment, independent of the compulsion to speak in the first instance.

The Supreme Court nevertheless ruled that *Miranda*-tainted statements may be admitted to impeach. Chief Justice Burger's opinion reasoned that the passage from *Miranda* condemning use of unwarned statements for impeachment "was not at all necessary to the Court's holding and cannot be regarded as con-

tion of the coercion issue. *Id.* at 224. In fact, Harris did raise the coercion claim. See *Harris v. New York*, 401 U.S. 222 (1971), Appendix at 57 (defense counsel states to trial judge that, to use statement to impeach, prosecution "has to show that it was voluntarily made, under the law, and in conformity with the requirements as set up in the case of *Miranda v. Arizona*"). The petition for certiorari clearly sets up the due process claim, independently of the *Miranda* claim. See *Harris*, Petition for Certiorari at 10. See also Alan M. Dershowitz and John Hart Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 Yale L.J. 1198, 1199 (1971) (charging the majority with "at best, gross negligence" concerning the record). The charge is harsh, but my own review of the record indicates that the charge is substantially justified.

35. See *Miranda*, 384 U.S. at 476-77.

trolling.”³⁶ Given the government’s substantial interest in preventing perjury,³⁷ exclusion from the government case in chief would suffice to deter future *Miranda* violations, for the police cannot know in advance whether there will be a trial or whether the defendant will testify if there is one.³⁸ Thus *Harris* may be justified as a trivial exception warranted by a compelling government interest.

The problem with that explanation is that the *Harris* majority would not permit *any* use, for impeachment or otherwise, of a statement they regarded as genuinely compelled, whether by overbearing interrogation methods or by the threat of a contempt sanction. In *Mincey v. Arizona*³⁹ the Court held that statements obtained in violation of *Miranda* could not be used to impeach the defendant’s testimony when those statements also ran afoul of the due process voluntariness test. All four justices in the *Harris* majority still serving joined the majority opinion. And in *New Jersey v. Portash*⁴⁰ Justice Stewart wrote a majority opinion, joined by Justice White, holding that testimony compelled under a grant of immunity might not be used even to impeach the testimony of the immunized witness at his subsequent criminal trial.⁴¹

How can we reconcile *Harris* with *Miranda* on the one hand and with *Portash* and *Mincey* on the other? I suggest two possible distinctions. The first rests on a waiver theory, and the second rests on the theory that statements admitted only to impeach are not testimonial.

1. The Waiver Theory

One possible distinction rests on a waiver theory. In general Fifth Amendment jurisprudence, the criminal defendant’s decision to take the stand and testify in his own defense waives the privilege with respect to cross-examination questions fairly

36. *Harris*, 401 U.S. at 224.

37. See *id.* at 225 n.2: “If, for example, an accused confessed fully to a homicide and led the police to the body of the victim under circumstances making his confession inadmissible, the petitioner would have us allow that accused to take the stand and blandly deny every fact disclosed to the police or discovered as a ‘fruit’ of his confession, free from confrontation with his prior statements and acts.”

38. See *id.* at 225.

39. 437 U.S. 385 (1978).

40. 440 U.S. 450 (1979).

41. Justice Blackmun, joined by Chief Justice Burger, dissented on a procedural ground. See *id.* at 463 (Blackmun, J., dissenting). But neither of these two members of the *Harris* majority hinted that the *Portash* Court had reached the wrong result.

raised by the direct testimony.⁴² There is no right to claim the privilege in response to such valid cross-examination questions, although it is unclear whether a defendant who did so could be held in contempt.⁴³ The judge can instruct the jury that the defendant has no privilege in this context. Contempt is probably unnecessary; the jury will draw devastating inferences from hearing the questions asked and hearing the privilege claimed in reply.

It follows that the cross-examination of Harris about his unwarned statement did not violate his privilege against being made a witness against himself at the trial, for by taking the stand and testifying contrary to the prior statement Harris waived his privilege against the use of the previously compelled admission. Suppose a bank robbery defendant takes the stand at trial and testifies "I had nothing to do with this, I was home with my wife at the time of the robbery." On cross the prosecutor would be allowed to ask "Isn't it true that you drove the getaway car?" If the defendant indeed drove the car he would be obliged to admit this; at any rate he could not successfully assert the privilege in response to the question.

Thus the defendant who testifies accepts the obligation to answer truthfully the prosecutor's questions on cross. The answers are not compelled because he had the alternative of not testifying, reinforced by an instruction to the jury to draw no inference of guilt from standing silent. When a previously compelled statement is excluded from the government's case-in-chief, the defendant faces the same choice.

While this provides a partial reconciliation of the cases, it does not completely erase the potential constitutional injury to the defendant. Questioning the suspect in custody without a valid *Miranda* waiver violates the privilege even if the answers are never used in evidence. The police have no authority to grant immunity, and questioning cruel at the time cannot be made uncruel retroactively.⁴⁴ As far back as *Marbury v. Madison*

42. See *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 285-88; *Brown v. United States*, 356 U.S. 148, 155-56 (1958); *Brown v. Walker*, 161 U.S. 591, 597-98 (1896); *United States v. Black*, 767 F.2d 1334, 1341 (9th Cir. 1985); Strong, *McCormick on Evidence* § 129 (cited in note 21).

43. See Strong, *McCormick on Evidence* § 129 (cited in note 21).

44. The logic of this argument is supported by the following: If the privilege is not violated until incriminating admissions are introduced into evidence against their declarant at a criminal trial, exclusion *ex post*, rather than immunity *ex ante*, would satisfy constitutional requirements. The government would not need to obtain a court order guaranteeing immunity before holding the witness who refuses to answer in contempt.

the Supreme Court ruled that a witness who claims the privilege need not disclose incriminating facts subject to future suppression, but can, absent immunity, refuse to answer questions calling for incriminating answers.⁴⁵ A few years later, Chief Justice Marshall, sitting as the trial judge in *United States v. Burr*, ruled that Burr's secretary could be compelled to testify about a code used in a letter sent by Burr, but only because knowledge of the code, which might have been acquired after the letter was sent, was not incriminating.⁴⁶ In neither *Marbury* nor *Burr* did Chief Justice Marshall invoke the Fifth Amendment; but at least to Joseph Story, the common-law and constitutional privileges were coextensive.⁴⁷ The claim that actual use of compelled declarations against the declarant at a criminal trial is essential to any violation of the Fifth Amendment privilege runs counter to founding-era practice.

If use of the evidence against the witness at a criminal trial were necessary to show a constitutional violation, a suspect tortured into confessing would have no Fifth Amendment based civil remedy if the government chose not to use the fruits at his trial. Yet the Fifth Amendment privilege was intended partly as an anti-torture provision.⁴⁸ Likewise the suspect could be sworn to the oath *ex officio* so long as the answers were not ultimately used against him, when the privilege was intended partly to ban fishing-expedition interrogations under oath.⁴⁹

The best interpretation recognizes that coercive questioning with the object of ultimate incrimination violates the privilege,

45. The *Marbury* Court heard evidence as the trier of fact and sustained Levi Lincoln's claim of privilege, even though Lincoln was not on trial. The Court did not compel him to answer with the assurance of future exclusion. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 144 (1803).

46. See *In Re Willie*, 25 F. Cas. 38 (C.C.D. Va. 1807) (No. 14692E).

47. See Joseph Story, *Commentaries on the Constitution* 662-63 (John E. Nowak and Ronald D. Rotunda eds., Carolina Academic Press, 1987).

48. See *id.*

49. The classic contributions on the role of the oath *ex officio* in the development of the Fifth Amendment privilege are John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 2250 (Little, Brown, 1st ed. 1904), and Leonard W. Levy, *Origins of the Fifth Amendment* (Oxford U. Press, 1968). Recent historical scholarship has challenged the Wigmore-Levy view by (1) identifying European sources for the privilege and by (2) pointing out that the privilege was rarely honored in early American criminal practice, which was characterized by self-representation. These objections do not undermine the claim that the founders respected claims of privilege *when they were raised*, or that they did so in large measure because of hostility to the procedure before the Star Chamber and the High Commission. For the revisionist scholarship, see R.H. Helmholz, ed., *The Privilege Against Self-Incrimination: Its Origins and Development* (U. of Chicago Press, 1997). For a tart rejoinder, see Leonard W. Levy, *Origins of the Fifth Amendment and Its Critics*, 19 Cardozo L. Rev. 821 (1997).

and that use of the evidence constitutes a separate and distinct violation.⁵⁰ When, as in *Harris*, the accused waives the objection to the use of the evidence at trial by waiving his privilege with respect to cross-examination within the scope of direct, the second violation drops from view. The pretrial violation needs to be deterred, but the scope of the deterrent remedy is fairly subject to policy-based qualifications just as is the Fourth Amendment exclusionary rule. The constitutional concern is what happened in the interrogation room, not what happened at the trial. It therefore made a certain amount of sense for the *Harris* majority to pattern the *Miranda* remedy on the Fourth Amendment exclusionary rule.

The obvious policy reason to qualify the *Miranda* exclusionary rule is to discourage and discredit perjury. This is a more pressing consideration in the *Harris* situation than in the *Portash* situation. The witness who swears to two inconsistent stories can be convicted of perjury by introducing both statements, proving both material, and leaving the jury to infer that one or the other must have been made with knowing falsity.⁵¹ Admissions to the police are not sworn; the inconsistent-sworn-statements method of proof will therefore not be available in a subsequent perjury prosecution. The government needs to prove the trial testimony false and the pretrial admission true beyond reasonable doubt, together with the defendant's scienter. The perjury penalty alone is therefore a far more reassuring check on false testimony in *Portash* than in *Harris*.

On the other hand, when the constitutional wrong to be deterred is flagrant and odious, tolerating perjury may be a lesser evil than rewarding police brutality. In the *Mincey* case the police persistently disregarded the suspect's pitiful handwritten notes refusing to make a statement and requesting counsel, even though they knew that the wounded prisoner was incoherent and in considerable pain.⁵² Typically statements obtained by such

50. See Stone, 1977 Sup. Ct. Rev. at 139-40 (cited in note 9).

51. See 18 U.S.C. § 1623(c) (1994). Immunized testimony may be used against the witness in a subsequent perjury prosecution even when the government does not claim the testimony was false or that it constitutes the *corpus delicti*. *United States v. Apfelbaum*, 445 U.S. 115, 121-32 (1980). Nor can a witness claim the privilege on account of the risk that his statements might be used against him in a prosecution for a crime he might commit in the future. *United States v. Freed*, 401 U.S. 601, 606-07 (1971). It follows that the government can rely on § 1623(c) even when the jury might conclude that the immunized testimony was true and subsequent testimony, without immunity, was false. See *United States v. Borski*, 125 F.3d 1115, 1119 (7th Cir. 1997).

52. Detective Hust questioned Mincey for nearly four hours in the intensive care

methods will not be trustworthy enough to be considered even for impeachment purposes. But even if they are thought reliable in a particular case, the need to deter the more extreme forms of police misconduct justifies a strict exclusionary rule in the coerced confessions cases.

Why, then, bar impeachment use of statements compelled before the grand jury under an immunity grant? The accused waived the objection to use at trial by taking the stand and covering the ground of the prior testimony in his trial testimony on direct examination. The prior questioning under the immunity grant was entirely legal. The questions asked before the grand jury are the very questions the prosecutor will put to the accused on cross-examination, and which the accused has no privilege to refuse to answer.

Nonetheless, as Justice Holmes remarked in a different context, the law must keep its promises. The government has a constitutional obligation to honor plea agreements.⁵³ Of greater relevance, when the government warns the suspect of the right to remain silent, *Doyle v. Ohio*⁵⁴ holds that it is fundamentally unfair to use post-warning silence for impeachment purposes. When the government undertakes to make no use of the witness's testimony in any future prosecution, and then does just that, a similar unfairness might well be perceived. Again, as in *Mincey*, it may be that giving the criminal defendant a chance at successful perjury is a lesser evil than rewarding official duplicity.

Exclusion in *Portash* is supported by more than a generalized obligation of governmental trustworthiness. Had the Court allowed the impeachment in *Portash*, witnesses given use immunity in future cases would face the cruel trilemma. They would know that their answers might indeed incriminate them in a future trial at which they might testify and be impeached. Honest answers might therefore incriminate, dishonest ones would constitute perjury, and silence would be punished by contempt given the immunity order. The *Portash* result is necessary to maintain the integrity of the immunity procedure. By contrast, if exclu-

unit, despite repeated requests for counsel. *Mincey*, who was nearly comatose upon admission, could not speak because of a tube in his throat and complained of "unbearable" pain. See *Mincey*, 437 U.S. at 397-401.

53. See *Santobello v. New York*, 404 U.S. 257 (1971).

54. *Doyle v. Ohio*, 426 U.S. 610 (1976).

sion from the case-in-chief satisfies deterrence, the *Harris* result does not compromise the integrity of the *Miranda* rules.

Pretrial questioning by the police takes place immediately after arrest, in an uncertain and fluid context. The police typically have hopes of obtaining an admissible confession by complying with *Miranda*, and they have little to gain by illegally questioning the suspect for the prize of keeping him off the stand at a future trial. There may be no future trial; most cases are either dismissed or end in guilty pleas. In any event excluding *Miranda*-tainted statements from the case-in-chief gives the police good reason to give the warnings and hope for the waiver that most suspects actually make in response.

By contrast, the prosecution can invoke the immunity procedure at the close of its investigation. Indeed there is no constitutional barrier to immunizing the defendant before a grand jury during a continuance given after the close of the prosecution's case at trial. With nothing to lose by granting immunity, the government could immunize every defendant on a routine basis. Those questioned would know that they faced a new trilemma: contempt, perjury, or practically forfeiting the constitutional right to testify at the coming trial.

An innocent defendant faces no such problem; he will tell the same story when immunized and when not immunized. Those comfortable with government duplicity and inclined to characterize the right to testify unimpeached as a right to commit perjury may conclude that *Portash* should be reconsidered. But the waiver theory can distinguish *Harris* from *Miranda*.

2. The Nontestimonial Evidence Theory

The waiver theory offers one way to distinguish *Harris* and *Miranda*. There is another possibility as well. Technically, the statement offered to impeach in *Harris* was not offered for truth, but only to prove that the witness was unworthy of belief.⁵⁵ The trial court instructed the jury to consider the prior statements only as they bore on credibility. If the jury followed the instruction, the evidence would not have been, strictly speaking, testimonial. It could be taken only as proof that the accused told different stories at different times, not that the story told out of

55. The trial judge so instructed the jury, although counsel discussed the substance of the prior statements. See *Harris*, 401 U.S. at 223. The constitutional taint is the only reason for the limiting instruction, as the admissions of the defendant are admissible against him notwithstanding the hearsay rule.

court was true and could be the basis for conviction. So used, the evidence, although verbal, would be no more testimonial than a compelled voice exemplar.⁵⁶

There is the standing risk that the jury will not, or even cannot, follow the instruction. Sometimes the Court finds this risk so extreme that the instruction will not save a conviction from constitutional attack. In other cases, however, the jury is presumed to follow the instruction even though that seems unlikely as a matter of fact. For example, the Court's confrontation clause cases sometimes accept, and sometimes reject, the adequacy of a limiting instruction.⁵⁷

Reasonable judges could accept the effectiveness of the instruction in the *Harris* context but reject it in the *Mincey* and *Portash* cases. A jury might well be more prone to use sworn, immunized statements as proof of guilt as distinct from incredibility. Untruthful answers to the grand jury could lead to a perjury charge, while a suspect might be manipulated or tricked into a false statement during police interrogation. A coerced confession lies at the other end of the reliability spectrum. The risk that the jury might use it for truth is therefore more disturbing

56. To be testimonial, the defendant's statement "must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe v. United States* ("Doe II"), 487 U.S. 201, 210 (1988). In *Harris* the jury was instructed to disregard any factual assertion contained in the tainted statements. Cf. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990). In *Muniz* the prosecution introduced a videotape of the DUI defendant, visibly intoxicated, answering booking questions about his physical description, address, and so on. Five justices (three of whom have left the Court) concluded that the evidence was testimonial, but within a booking exception to *Miranda*. Four justices (one of whom has left the Court) concluded that the answers to these questions were not testimonial in the first place. Because it was the delivery, not the content, of the answers to the booking questions that incriminated Muniz, I think it is better to accept the dissent's characterization of the evidence as nontestimonial. If the majority view is thought sounder, then *Muniz* becomes a case like *Quarles*, *Perkins*, and *Berkemer*, in which the suspect is in custody and is interrogated, but the inherent compulsion of custodial interrogation is nonetheless absent. See notes 82-85 *infra* and accompanying text.

57. Compare *Bruton v. United States*, 391 U.S. 123 (1968) (limiting instruction inadequate to preserve defendant's confrontation clause rights when confession of nontestifying codefendant is admitted at joint trial) with *Richardson v. Marsh*, 481 U.S. 200 (1987) (where confession is redacted to avoid direct reference to nonconfessing codefendant, limiting instruction is adequate to protect confrontation clause rights), and *Tennessee v. Street*, 471 U.S. 409 (1985) (where A's confession is introduced to rebut B's claim that reading A's confession to B by the police during interrogation coerced B into false confession, limiting instruction is adequate to protect confrontation clause rights). For other cases in which the presumption that the jury follows the instructions was necessary to sustain the constitutionality of a conviction, see *Greer v. Miller*, 483 U.S. 756 (1987) (no *Doyle* violation when court sustained defendant's objection and instructed jury to disregard improper question); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (instruction to disregard improper closing argument held adequate to prevent due process violation).

than the specter of similar use of a statement obtained after a defective Fifth Amendment waiver.

In *Harris*, there is a greater risk of perjury with impunity than in *Portash*. In *Mincey* the original constitutional violation was grave and flagrant, and the need for deterrence at its maximum. Fair-minded judges could conclude that the curative instruction provided all the remedy required in *Harris*, but not in *Portash* or *Mincey*.

The arguments that a testifying defendant waives the application of the privilege at trial, and that impeachment use of prior statements is not testimonial, although independent, add to each other's force. The defendant who takes the stand has no privilege with respect to the substance of the prior statements; the questions asked by the police in interrogation could be asked by the prosecutor on cross. The jury will be instructed, nonetheless, *not* to use the statements for truth but only as they bear on credibility. Reasonable judges might have decided *Harris* the other way, but the result in *Harris* does not call *Miranda* into question.

B. OREGON V. HASS

The second case in which the Supreme Court has approved the admission of a statement tainted by a *Miranda* violation is *Oregon v. Hass*.⁵⁸ After receiving *Miranda* warnings, Hass asked for a lawyer. The police, however, continued questioning, and the answers Hass gave were admitted at his trial to impeach his testimony. Hass, unlike *Harris*, actually asserted his right to terminate questioning under *Miranda*. In such a case, the police have nothing to lose by questioning illegally; the impeachment exception gives them a positive incentive to do so. Nonetheless, in *Hass* the Burger Court again dismissed this incentive effect as "speculative" and permitted the impeachment.⁵⁹

Hass is far closer to *Portash* than to *Harris*. The suspect who receives *Miranda* warnings and invokes the right to counsel invokes his Fifth Amendment rights just as he might before a grand jury or a legislative committee. Faced with a valid claim of Fifth Amendment privilege before the grand jury, the prosecutor may not badger the witness but must instead resort to the immunity procedure. Moreover, unlike the case of the un-

58. 420 U.S. 714 (1975).

59. *Id.* at 723.

warned suspect, from whom the police may hope to obtain fully admissible statements after a valid *Miranda* waiver, the police have little incentive to cease questioning a suspect who invokes in response to the warnings. The chance that the suspect may spontaneously initiate conversation about the case, thereby opening the door to new warnings and a valid waiver, is slight. Civil liability is a chimera.⁶⁰

Two subsequent developments have undermined the reasoning in *Hass*. One is a factual development, the other legal. The factual development is the apparent willingness of the police to question after express invocation for the purpose of obtaining impeachment material. The *Hass* opinion described this prospect as "speculative." Current research suggests that speculation has come true.⁶¹

The legal development is the Court's vigorous enforcement of the bar on reinterrogation of suspects who invoke the right to counsel. In *Edwards*,⁶² *Roberson*,⁶³ and *Minnick*⁶⁴ the Court has rejected emphatically government pleas for permission to reinterrogate after invocation. The distinction between *Edwards* and *Mosley*⁶⁵ is that the suspect who claims the right to silence keeps his own counsel, while the suspect who invokes the right to counsel admits that he is out of his depth.⁶⁶ The suspect who admits he can't handle interrogation after the warning surely can't handle interrogation that persists *in the face of invocation*. He surely doesn't understand the distinction between impeachment and the case in chief. His answers are more likely to be the

60. The majority of courts hold that *Miranda* claims do not support an action under 42 U.S.C. § 1983. See Gardner, 30 Am. Crim. L. Rev. at 1294-97 (cited in note 9). Even if they did, and even if the plaintiff could overcome the defendant's qualified immunity, in typical cases damages would be too low to justify the cost of suit. The suspect is by hypothesis lawfully arrested and so cannot claim damages attributable to confinement alone.

61. See Weisselberg, 84 Cornell L. Rev. at 153-62 (cited in note 10).

62. *Edwards v. Arizona*, 451 U.S. 477 (1981) (suspect who invokes *Miranda* may not validly waive *Miranda* rights if police, rather than the suspect, initiate discussion of the case).

63. *Arizona v. Roberson*, 486 U.S. 675 (1988) (suspect who invokes *Miranda* right to counsel may not validly waive *Miranda* rights absent initiation of discussion by suspect even if post-invocation questioning concerns a different offense).

64. *Minnick*, 498 U.S. at 153 (suspect who invokes *Miranda* right to counsel may not validly waive *Miranda* rights, absent initiation by suspect, even after consulting with counsel).

65. *Michigan v. Mosley*, 423 U.S. 96 (1975) (suspect who invokes right to silence, rather than right to counsel, may make valid waiver if rewarned by police after a break in the action).

66. See *id.* at 110 n.2 (White, J., concurring).

confused or frightened replies that may shed false if any light on the truth of inconsistent trial testimony.

The only significant distinction between *Hass* and *Portash* is that a subsequent perjury prosecution offers a more efficacious remedy for false trial testimony in the *Portash* context than in the *Hass* context. If the Court, following the theory that taking the stand at trial waives the objection to the introduction of the previously compelled testimony, were to overrule *Portash*, *Hass* could be maintained. If the Court reached the same result by following the theory that prior inconsistent statements offered to impeach are not testimonial, *Hass* could likewise be maintained. If, however, the justices were to reaffirm *Portash*, the greater credibility of a perjury prosecution when the pretrial statements are sworn is a genuine but modest distinction. My own view is that *Hass* and *Portash* are irreconcilable, but that this is the only instance of a really serious conflict in the *Miranda* caselaw. *Hass* predates both *Portash* and *Edwards*; any inconsistency is accordingly not chargeable to the *Hass* majority. It could certainly be dealt with by holding, in an appropriate future case, that *Portash*, *Edwards*, *Roberson* and *Minnick* effectively repudiated *Hass*.

C. *MICHIGAN V. TUCKER*

Tucker was arrested for rape a few months before the Supreme Court's decision in *Miranda*.⁶⁷ The police advised him of the right to silence and to counsel, but did not advise him of his right to have counsel appointed if he were indigent. Tucker told the police he understood the rights they had told him about and made a statement to the effect that he had been with one Henderson at the time of the rape. When police interviewed Henderson, he told police that Tucker had left his company early enough to have committed the crime. Henderson also told the police that he had seen Tucker the next day with scratches on his face and that Tucker had made some incriminating statements at that time.

The trial court suppressed Tucker's statements but not Henderson's testimony. The Michigan courts affirmed the conviction, but a federal district judge granted Tucker's petition for habeas corpus. The Sixth Circuit affirmed the district court, but

67. The facts of the case are drawn from the Supreme Court's opinion in *Michigan v. Tucker*, 417 U.S. 433 (1974).

the Supreme Court reversed, holding that Henderson's testimony was admissible.

Tucker is thought to be incompatible with *Kastigar v. United States*,⁶⁸ which upheld the constitutionality of use-plus-fruits immunity. The *Kastigar* opinion clearly indicates that immunity would not be constitutional if evidence derived from compelled testimony were admissible. From the tension with *Kastigar* and the *Tucker* opinion's characterization of the *Miranda* rules as prophylactic safeguards, one might conclude that the Court has called *Miranda*'s constitutional foundation into question.

Kastigar, however, can be squared with *Tucker*. There is a tremendous difference between the deliberate pace of an investigation run by the prosecutor's office and the haste and uncertainty of a police investigation.⁶⁹ In the former context, the prosecutors have the great luxury of deferring immunized testimony until the conclusion of their other investigative work, enabling them to lay out their independent evidence in the application for an immunity order. There will be no question at trial whether the government had an independent source for all the evidence described *before* the immunized testimony was given.

Police interrogation presents a very different situation. Once the accused appears in court and defense counsel is either retained or appointed, the Sixth Amendment right to counsel will attach and ordinarily prohibit further questioning. The time frame within which the police may question the suspect under the *Miranda* rules is measured in hours. If a tainted statement leads police to other evidence, the prosecution will have much more difficulty proving inevitable discovery or independent source than is encountered by prosecutors proceeding under an immunity statute.

This problem is especially acute when the derivative evidence is a human being, who might well have come forward voluntarily at any time.⁷⁰ The *Tucker* opinion nowhere suggests that

68. 406 U.S. 441 (1972).

69. See *id.* at 471 (Marshall, J., dissenting). Justice Marshall's point was that transactional immunity could fairly be required in the context of immunity orders but not of police investigations, but the distinction remains valid even when we compare use immunity grants with police investigations.

70. See *United States v. Ceccolini*, 435 U.S. 268, 280 (1978) ("Obviously no mathematical weight can be assigned to any of the factors which we have discussed, but just as obviously they all point to the conclusion that the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object.")

any and all evidence derived from a *Miranda* violation is admissible. Quite the contrary; Justice Rehnquist's opinion emphasized the good faith of the police as a reason to admit the evidence.⁷¹ Clearly a case in which the police persisted in questioning a suspect who had invoked his rights, with the conscious object of learning the location of incriminating physical evidence, would present a very different case.

The best reading of *Tucker* is that the defendant bears the burden of proving that the government obtained the derivative evidence by exploiting the *Miranda* violation, and could not have discovered the evidence otherwise. This is the reverse of the rule in *Kastigar*; the government must prove that evidence is *not* derived from immunized testimony. The difference between police interrogation and grand jury investigations, however, could justify a different assignment of the burden of proof. In many cases the police either had an independent source or would have inevitably discovered the derivative evidence, but this cannot be proved as easily in the police interrogation as in the grand jury context.

On this reading *Miranda* violations are still constitutional violations. The Fifth Amendment requires use-plus-fruits immunity in *Kastigar* cases and use-plus-fruits exclusion in *Miranda* cases. The only difference is a defensible procedural one on who bears the burden of proof.

D. OREGON V. ELSTAD

Elstad was suspected of burglary and arrested at his home in the presence of his mother.⁷² Without giving *Miranda* warnings the police questioned him briefly, and he admitted that he had been present at the scene during the crime. An hour later, at the police station, Elstad received the *Miranda* warnings, waived, and made a written confession. The Oregon courts suppressed both the initial admission and the subsequent confession.

The Supreme Court reversed. The opinion rejects the analogy to Fourth Amendment fruits analysis in the context of successive admissions, but it does not hold that evidence derived from a *Miranda* violation is automatically admissible. The Ore-

71. See *Michigan v. Tucker*, 417 U.S. at 447 ("We consider it significant to our decision in this case that the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in *Miranda*.").

72. The facts are taken from the Supreme Court's opinion in *Oregon v. Elstad*, 470 U.S. 298 (1985).

gon court had in effect presumed that a tainted statement made a subsequent voluntary statement impossible for an extended period of time.⁷³ Then-Associate-Justice Rehnquist wrote for the majority that "[w]e hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings."⁷⁴

Whether an unwarned admission in fact undermines the voluntariness of a subsequent *Miranda* waiver is a question of fact. "As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements."⁷⁵ There was no evidence in *Elstad* that the police exploited the admission or otherwise pressured the suspect into waiving his rights at the station.

The only potential difficulty is that *Elstad* might be inconsistent with both *Kastigar* and the due process cases in which one coerced confession is a factor tending to show that a subsequent statement was also coerced.⁷⁶ If fact, there is no real tension with *Kastigar*. Suppose a witness testifies before a grand jury under a grant of immunity. As soon as she leaves the grand jury room, she is arrested. If the police administer good *Miranda* warnings, and she signs a waiver card and makes incriminating admissions, *Kastigar* requires suppression only if the government fails to prove that the statements to the police were obtained independently of the immunized testimony. That inquiry turns out to be precisely the inquiry into voluntariness of the *Miranda* waiver required by *Elstad*. In other words, if the police exploited the immunized testimony to get the statements, *Elstad* agrees with *Kastigar* in requiring suppression.

Nor is there any irreconcilable inconsistency between *Elstad* and the coerced confession cases. Even in the coerced confession cases the Court sometimes held a subsequent statement admissible.⁷⁷ Presumably, the causal influence of coercion per-

73. See *State v. Elstad*, 658 P.2d 552, 554 (Cl. App. Or. 1983), *rev'd sub nom Oregon v. Elstad*, 470 U.S. 298 (1985).

74. *Oregon v. Elstad*, 470 U.S. at 318.

75. *Id.*

76. On the tension with the coerced confession cases, see *id.* at 324-28 (Brennan, J., dissenting).

77. See *Lyons v. Oklahoma*, 322 U.S. 596 (1944) (second confession, given twelve hours after initial coerced confession, held voluntary). See also *United States v. Bayer*, 331 U.S. 532 (1947) (second confession, obtained after initial conversation tainted by *McNabb* violation and possible coerced, held voluntary).

sists after that of a *Miranda* violation has dissipated. Likewise the law is justifiably more eager to deter coercive questioning than to enforce *Miranda*'s special waiver rule. Bringing *Bentham* up to date a bit, a question is not a stun gun.

Just as in *Tucker*, *Elstad* is best read as a burden of proof decision. If the suspect makes an unwarned admission, is later given good warnings and executes a waiver, the burden is on the defense to show that the initial police questioning coerced the suspect into the waiver. This burden will rarely be met, but it could be in appropriate cases. Suppose, for example, that in the *Elstad* case the police had said: "Look, kid, you gave it up already, you might as well tell us the whole story." Whether the evidentiary force of police exploitation would overcome the fact that the suspect knew his rights and signed them away is a very different question than that presented in *Elstad*.

E. *NEW YORK V. QUARLES*

Quarles was arrested for rape, after a chase, in the back of a supermarket. One of the arresting officers frisked him immediately after his surrender and found an empty shoulder holster. With the suspect in handcuffs but not yet warned, the officer asked where the gun was. Quarles indicated where he had left it. The Supreme Court held that the statement and the gun were admissible pursuant to a public safety exception to *Miranda*.

Quarles is easy to reconcile with *Miranda*. Although Quarles was clearly in custody and clearly questioned, there is more to custodial interrogation than the bare technical coincidence of custody and a question. *Miranda*'s concern was with secret stationhouse questioning under the complete control of the police. As Professor Yeager has persuasively argued, the evil of custodial interrogation is synthetic even though the law treats custody and interrogation as analytically distinct elements that must co-exist before *Miranda* comes into play.⁷⁸ Quarles was asked one question, in public, in the immediate aftermath of the chase. That the Court recognized an exception to *Miranda* only when an urgent threat to public safety was added to these facts shows just how strong the Court's commitment to *Miranda*'s bright-line rules really is.

78. See Daniel Yeager, *Rethinking Custodial Interrogation*, 28 Am. Crim. L. Rev. 1 (1991).

A persuasive analogy exists between *Quarles* and decisions finding no custodial interrogation even though the suspect was in custody and was interrogated. In *Berkemer v. McCarty*,⁷⁹ the Court, per Justice Marshall, held that questioning motorists stopped for traffic infractions does not trigger *Miranda*'s safeguards. In *Illinois v. Perkins*⁸⁰ the Court held that a prison inmate questioned by an informant was not subject to custodial interrogation within the meaning of *Miranda*. In *Quarles*, just as in *Perkins* and *McCarty*, it is fair to say that the defendant was not free to leave and was interrogated, but that the presumptively coercive environment of custodial interrogation was nonetheless absent. If this is so, *Quarles* is consistent with *Miranda*.

III. THE IMPLICATIONS OF RECONCILING THE MIRANDA CASES FOR THE DICKERSON LITIGATION

The *Dickerson* majority is right about at least one thing—Title II of the Omnibus Crime Control and Safe Streets Act is inconsistent with *Miranda*. Far from accepting the Court's invitation to experiment with alternative safeguards to reduce the coercive pressure of custodial interrogation, Congress simply demanded a return to the pre-*Miranda* voluntariness test.⁸¹ If *Miranda* is indeed a constitutional decision, then the statute is unconstitutional.

If the argument presented so far is correct, the Supreme Court can maintain the constitutional status of *Miranda* without calling into question any of its precedents save possibly *Oregon v. Hass*. (As previously indicated, although I am not persuaded that *Hass* can be saved, there are at least colorable arguments to the contrary.) By contrast, if the Court were to hold Title II constitutional and abjure *Miranda*'s constitutional foundations, the Court would be obliged to overrule every one of its decisions reversing a state conviction on *Miranda* grounds.

The Court has no common-law or supervisory power over criminal justice in the states. To reverse a state conviction the Court must find a justification in the laws or Constitution of the United States. It follows that when the Court reverses a state conviction on *Miranda* grounds, the *Miranda* rules must have constitutional stature, because there are no federal laws, apart

79. 468 U.S. 420 (1984).

80. 496 U.S. 292 (1990).

81. § 3501(b) explicitly repudiates *Miranda* by providing that advising the suspect of his rights is only one factor to be considered in determining admissibility.

from the Constitution, that might justify reversal. The *Dickerson* court therefore supposes that roughly a dozen decisions of the Supreme Court must be flat-out overruled. The holdings in *Withrow*,⁸² *Keohane*,⁸³ *Muniz*,⁸⁴ *Minnick*,⁸⁵ *Roberson*,⁸⁶ *Edwards*,⁸⁷ *Smith*,⁸⁸ *Tague*,⁸⁹ *Orozco*,⁹⁰ *Miranda*, *Vignera*⁹¹ and *Stewart*⁹² cannot be squared with § 3501. Given current Sixth Amendment law, upholding § 3501 would require throwing out the result in *Escobedo v. Illinois*⁹³ as well.

To be sure, there is plenty of language in the Court's opinions characterizing *Miranda* as something less than constitutional. Good lawyers, however, quite properly focus on the holdings of the cases. The holdings in *Harris*, *Tucker*, *Elstad* and *Quarles* can all be squared with *Miranda* and with the Fifth Amendment jurisprudence at large.

82. *Withrow v. Williams*, 507 U.S. 680 (1993).

83. *Thompson v. Keohane*, 516 U.S. 99 (1995) (reversing denial of state prisoner's petition for federal habeas based on *Miranda* violation because lower federal courts erroneously presumed state court fact-finding correct).

84. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (holding that state courts should have excluded DUI suspect's answer ("I don't know") to post-custody, pre-warning question about date of suspect's sixth birthday).

85. *Minnick v. Mississippi*, 498 U.S. 146 (1990) (reversing state court conviction because trial court admitted statements obtained by post-invocation interrogation that followed consultation with counsel).

86. *Arizona v. Roberson*, 486 U.S. 675 (1988) (affirming state courts' exclusion of post-invocation statement obtained by questioning undertaken pursuant to separate investigation).

87. *Edwards v. Arizona*, 451 U.S. 477 (1981) (reversing state court conviction because trial court admitted statements obtained by reinterrogating suspect who had invoked *Miranda* right to counsel).

88. *Smith v. Illinois*, 469 U.S. 91 (1984) (reversing state court conviction because trial court admitted statement obtained by interrogation that followed suspect's unequivocal request for counsel).

89. *Tague v. Louisiana*, 444 U.S. 469 (1980) (reversing state conviction because state courts found valid *Miranda* waiver without evidentiary support).

90. *Orozco v. Texas*, 394 U.S. 324 (1969) (reversing state conviction because trial court admitted statements obtained by custodial questioning without required warnings).

91. *Vignera v. New York*, 384 U.S. 436, 493-94 (a companion case to *Miranda*, reversing a state conviction for failure to give adequate warnings).

92. *California v. Stewart*, 384 U.S. 436, 497-99 (another companion case to *Miranda*; the Court affirmed the state supreme court's reversal of the conviction because the record did not show that warnings were given).

93. 378 U.S. 478 (1964). *Escobedo* asked to see his lawyer, while his lawyer was trying to see him, after *Escobedo* had been arrested but before the filing of formal charges. Under *Kirby v. Illinois*, 406 U.S. 682 (1972), the Sixth Amendment attaches only with the filing of formal charges or the initiation of judicial proceedings. Accordingly *Escobedo*'s Sixth Amendment rationale is no longer good law. Absent *Miranda*, the police disregard of *Escobedo*'s request for counsel would not justify excluding his admissions.

And it is clear that the Court would prefer to maintain its holdings rather than its dicta. Justice Stewart dissented in *Miranda*, but eleven years later he wrote an opinion rebuffing the plea of twenty one states that *Miranda* be overruled.⁹⁴ Justice White wrote a vigorous dissent in *Miranda*, yet he later wrote the opinion that did the most to reinvigorate and even expand the scope of the *Miranda* rules.⁹⁵ Justice Harlan dissented in *Miranda* but followed *Miranda* in the *Orozco* case for reasons of *stare decisis*.⁹⁶ Chief Justice Burger, the author of *Harris* and a bitter dissenter in *Williams*, wrote that he would "neither overrule *Miranda*, disparage it, nor extend it at this late date."⁹⁷ "This late date" was the twelfth of May, 1980. Jimmy Carter was President of the United States and the Berlin Wall would stand for nine more years.

If *Miranda* in particular has gained adherents over time, constitutional *stare decisis* in general has assumed greater prominence since the plurality opinion in *Planned Parenthood v. Casey*.⁹⁸ According to the *Casey* plurality, overruling controversial landmarks under fire is an especially disfavored course.⁹⁹ If that is so, upholding Title II would be suspect even if there were otherwise a strong case for overruling *Miranda*. Title II was a direct repudiation of the Court's decision in *Miranda*; it was passed only after a provision stripping the Supreme Court of jurisdiction in confession cases was deleted from the bill by a few votes in the Senate.¹⁰⁰ If a landmark precedent was ever "under fire," *Miranda* was when Congress adopted Title II.

94. See *Brewer v. Williams*, 430 U.S. 387 (1977). The Eighth Circuit had set aside Williams' conviction for the rape and murder of a ten year old girl on Christmas Eve on *Miranda* grounds. See *Williams v. Brewer*, 509 F.2d 227, 233 (8th Cir. 1974) (relying on *Miranda*). For the submission of the states, see *Brewer v. Williams*, 430 U.S. 387 (1977), Brief Amicus Curiae of Americans for Effective Law Enforcement et al., at 10. Justice Stewart's opinion for the Court set aside the conviction on Sixth, rather than Fifth, amendment grounds.

95. See *Edwards v. Arizona*, 451 U.S. 477.

96. See *Orozco v. Texas*, 394 U.S. 324 (1969) (Harlan, J., concurring).

97. *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring).

98. 505 U.S. 833 (1992) (plurality opinion).

99. See *Casey*, 505 U.S. at 867.

100. 90th Cong., 2d Sess. (May 21, 1968), in Cong. Rec. 14177. For a general history of the adoption of the bill, see Adam Carlyle Breckenridge, *Congress Against the Court* 39-94 (U. of Nebraska Press, 1970). The removal of the more extreme provisions on the floor of the Senate suggest that even further tempering might have taken place in the House. But on June 5, Robert Kennedy was assassinated—the second political assassination of the year and the third in five years. The next day the House passed the Senate bill by voice vote, without calling for a conference. 90th Cong., 2d Sess. (June 6, 1968), in Cong. Rec. 16299-300.

Well-trained lawyers may well wonder at the spectacle of a circuit court judge, joined by a district court judge sitting by designation, defying the holdings of a dozen Supreme Court cases. Well-trained lawyers would expect such judges to make every possible effort to reconcile perceived inconsistencies in the Supreme Court precedents before blithely concluding that dicta deserve more respect than holdings. Certainly many thoughtful judges and scholars believe that the *Miranda* caselaw is inconsistent. But before embracing that conclusion a lower court ought to have labored long and hard to save, rather than to destroy, as much of the existing law as possible. The failure of the *Dickerson* opinion to make even the slightest effort in this direction can only be described as unprofessional.

CONCLUSION

My point is not that the existing caselaw is ideal, only that it is not dysfunctionally incoherent. *Miranda*, as the Court has come to recognize, is a compromise between a free society's need to protect itself from crime and its abiding respect for individual dignity and autonomy. Some such compromise will always be with us, and many potential alternatives might be better compromises than the one struck in *Miranda*.

Those commentators who have pointed out the tension between the prophylactic rules cases and the cases applying *Miranda* to the states are by no means incorrect in their assessment of the Court's actual work product. None of the justices has attempted to reconcile the impeachment cases with the state *Miranda* cases, and the majority opinions in *Elstad* and *Tucker* were affirmatively written to call *Miranda* into question when this was not necessary to the results. Chief Justice Burger's majority opinion in *Harris*—one joined by Justice Harlan, of all people—clearly misread the record in order to reach the *Miranda* impeachment issue.¹⁰¹ There is plenty to criticize in the *Miranda* caselaw.

If, however, the issue is whether *Miranda* is good law, the answer must be yes. If tensions among precedents and conflicts expressed in dicta authorize lower courts to depart from Supreme Court precedent, what body of constitutional law is safe? The Tenth and Eleventh Amendment jurisprudence? The Commerce Clause jurisprudence? The sexual privacy cases?

101. See note 34.

The Takings Clause jurisprudence? The Court works under the constraints of collective decision theory.¹⁰² Demanding that every pronouncement in every opinion reflect an identical justifying theory, over decades of decisions in cases that divide good judges, asks too much. With luck there may be some underlying logic in the decisions that none of the justices subscribed to as individuals.

That does not imply that the results in *Harris*, *Hass*, *Tucker* and *Elstad* were in any way *required* by *Miranda*. It would be easier—far easier—to square rulings for the defense in these cases with *Miranda* than it is to square the actual rulings for the prosecution. But there is an important difference between the difficult and the impossible.

What I have offered in this essay are some principled arguments that might explain how *Miranda*, the Burger and Rehnquist Courts' *Miranda* decisions, and general Fifth Amendment privilege jurisprudence can be reconciled with each other. I started out thinking that such a reconciliation is impossible. I have become convinced that good lawyers can work through the *Miranda* caselaw to find some coherent synthesis, although I am by no means convinced that my own arguments are the only or even the best reconciliation that is possible.¹⁰³ After all, this essay represents one of the first serious attempt to reconcile the cases, as opposed to seizing on each line as authority for rejecting the other.

To say that a synthesis is impossible would be to say that the justices who have enforced *Miranda* in state court while qualifying the *Miranda* exclusionary rule generally were indulging in hypocrisy in the latter cases and in arbitrary power in the former. The *Miranda* caselaw contains much to censure. Nonetheless,

102. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802, 811-31 (1982).

103. Professor Weisselberg has suggested a synthesis based on good faith. See Weisselberg, 84 Cornell L. Rev. at 184, 188 (cited in note 10). In *Harris*, *Tucker*, *Hass*, and *Elstad* the police did not deliberately violate *Miranda*. His admirable article offers one illustration of how good lawyers might reconcile the *Miranda* caselaw. We agree that *Tucker* and *Elstad* should be thought of as exclusionary rule decisions, although I would shift the burden of proving attenuation while he would focus on good faith. I think it is much harder to characterize the impeachment decisions as exclusionary rule decisions, at least without some explanation, such as waiver or nontestimonial evidence, of why receiving a compelled statement at trial does not constitute an independent violation of the Fifth Amendment privilege. Moreover, I am reluctant to put too much reliance on the good faith excuse, an excuse which seems to tolerate violations of constitutional rights by the police with no attendant remedy. See Donald Dripps, *Living With Leon*, 95 Yale L.J. 906 (1986).

hypocrisy and usurpation would be unfair charges to level against the likes of Byron White and Potter Stewart, who thought their obligation to apply the law as it is at the time of decision required them both to dissent from decisions they thought unsound *and* to follow those decisions once they had been made. They may have failed to articulate a fully satisfying theory, but it does not follow that no such theory can be found.